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NO. 93-1224

**IN THE
SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1993

**TODD PACIFIC SHIPYARDS CORP., and
AETNA CASUALTY AND SURETY CORP.,**

Petitioner,

vs.

**RICHARD L. EDWARDS,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED FOR REVIEW

I. Was there substantial evidence to support the findings of the Administrative Law Judge that the Employer failed to establish the availability of suitable alternative employment?

II. May an Employer escape financial responsibility as a matter of law from paying permanent and total disability benefits by showing a single, temporary job which the claimant could perform?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Richard L. Edwards (hereinafter "Edwards" or "Claimant") submits his Brief In Opposition To The Petition For Writ of Certiorari submitted by Petitioners Todd Pacific Shipyards Corp., and Aetna Casualty And Surety Corp., ("Todd" or "Employer") seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 14, 1993.

STATEMENT OF THE CASE

Edwards worked as a burner/welder for Todd from December 12, 1979 through approximately 1984. Edwards sustained a low back injury on May 5, 1981 while employed by Todd. Following his back

injury Edwards worked intermittently at Todd until 1984. The parties agree that Edwards could no longer do his job as a burner/welder due to his injury.

Edwards attended the California Training Institute for fifteen weeks in a rehabilitation program and received a certificate as a mechanical inspector. The parties agree that the work of a mechanical inspector constituted suitable alternative employment.

From August 20, 1985 to November 5, 1985, Edwards worked as a floor inspector at Nordon Manufacturing Company inspecting machine parts. He

was laid off apparently due to a reduction in force as a result of lack of work. Edwards was unemployed from November 7, 1985 until September 25, 1986 when he got a job through a temporary service. He worked for Excellon as a receiving inspector checking parts that had been shipped into the company from September 25, 1986 until November 5, 1986 when that job ended. Thus, the totality of Edwards' experience as a mechanical inspector was eleven weeks.

The central issue at trial was very precise: Did the Employer establish that jobs as a mechanical inspector were available to the Claimant?

At the hearing before the Administrative Law Judge ("ALJ"), Todd submitted two labor market surveys and testimony regarding available work for mechanical inspectors in Los Angeles and Orange Counties.

The first labor market survey procured by the Employer was conducted in March, 1985 (four months before Claimant was certified as a mechanical inspector in June, 1985).

Three of the listings required at least one year of experience which Edwards did not have. For two other listings, the required qualifications were uncertain and

for the rest there were no present openings. As to the March, 1985 survey the ALJ found that no more than two of the listings showed current openings and a willingness to accept applicants without prior experience .

In a November, 1986 survey, at least three of the ten listings required one or more years of prior experience. Edwards testified that he also did not have the experience required by a fourth employer A fifth listing did not require specific experience but had no openings. Thus, at least half of the listings on their face precluded Claimant.

Employer's Rehabilitation Specialist, Stephen Lowe, testified that claimant was personable, on-time, visited employers regularly, and was otherwise fully cooperative. Claimant looked for work in El Segundo, Carson, Inglewood, Long Beach and Orange County. He spent approximately five hours a day, four days per week following up job leads through newspapers and though employed friends.

Additionally, claimant contacted all employers listed on the labor market survey obtained by the Employer.

The Employer's witness, Stephen Lowe, agreed that Claimant attempted to

obtain employment at 39 different places without success.

Claimant, working with the Employer's rehabilitation specialist failed to locate even one job opening after contacting all the employers on the labor market survey.

Based on more than thirty pages of testimony with reference to Claimant's attempts to find work, the ALJ found that Claimant diligently attempted to find work as a mechanical inspector .

The ALJ further found that the employer did not meet its burden of

showing suitable alternative work available to the Claimant.

> In spite of the positive review of claimant's interviewing skills by the job development specialist and claimant's efforts to secure and retain a job as a mechanical inspector, he has had very little success. His first employment as a mechanical inspector ended due to insufficient available work. (TR 58) Although respondent's rehabilitation specialist testified to a foreseeable growth in the need for mechanical inspectors, this foreseeable growth appears purely speculative (TR 64). Respondents have shown some listings of job openings; but have not established that these job openings are available to claimant or are ones he could realistically compete for and have a chance of securing. Thus I find that

> respondents have not met their burden of showing suitable alternative work that is available.

Todd appealed the ALJ's decision to the Benefits Review Board which held that the one job at Nordon ipso facto demonstrated the existence of suitable alternative employment. The BRB, relying on P & M Crane Company v. Hayes, 930 F. 2d 424 (5th Cir. 1991), noted that even one suitable alternative employment position could be sufficient to satisfy the employer's burden of establishing suitable alternative employment. However, that case also held that "whether the one job identified by the Employer's expert is actually available would be a factual

determination for the particular case". Id. at 431.

The BRB took no notice of whether or not substantial evidence supported the contrary conclusion - that the two temporary jobs were no longer available to Claimant and he therefore had no realistic province of ongoing available employment. Ignoring the fact-finding province of the ALJ, the BRB simply decided the issue de novo. In so doing, the BRB also ignored Claimant's showing of diligence in attempting to secure the allegedly available work and held that such a showing played no role whatsoever in either the establishment of suitable

alternative employment or rebutting the showing thereof.

Edwards appealed to the Ninth Circuit Court of Appeals which framed the issue as: "Whether Edwards' short-lived job as a mechanical inspector satisfied Todd's burden of proving the existence of suitable alternative work." 999 F. 2d 1374, 1375 (9th Cir. 1993).

The Ninth Circuit adopted the view of the Director of the Office of Workers' Compensation Programs that an eleven week job as a mechanical inspector did not ipso facto carry Todd's burden of showing suitable alternative work. This was the case because Todd failed to establish that

employment as a mechanical inspector was "realistically and regularly available" to Edwards on the open market. Id.

The Ninth Circuit noted initially that the Longshore and Harbor Workers' Compensation Act ("the Act") requires the employer to pay permanent total disability benefits when an injured worker is no longer able to perform his usual customary job duties. The employer may escape that liability only if realistic wage earning alternatives exist for the injured worker. To permit the employer to escape financial responsibility by showing illusory or temporary jobs would defeat the very purpose of the Act by leaving an injured

worker unemployed and unemployable, without disability benefits. Consequently, to establish suitable alternative employment such that the employer is relieved of its obligation to provide permanent disability benefits, the employer must show "post-injury employment ... sufficiently regular to establish true earning capacity." Id. Such a result "fairly serves the long-term remedial purpose of the LHWCA, an Act designed to 'compensate for any injury-related reduction in wage-earning capacity through the claimant's lifetime.' Randall v. Comfort Control, Inc., 725 F. 2d 791, 799 (D.C. Cir. 1984) (emphasis added)" (Footnote deleted). Id. pp. 1375-1376.

The Ninth Circuit further found that substantial evidence in the trial record supported the ALJ's determination that Todd did not prove the availability of suitable alternative work. The proferred jobs in Todd's labor market surveys were generally not available because Edwards lacked the requisite experience or he was unable to get the listed jobs for other reasons despite a diligent and exhaustive search. Id. p. 1376.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED LAW AND THE REMEDIAL PURPOSES OF THE LHWCA.

To make its case, Todd grossly exaggerates the Ninth Circuit's holdings. Nothing in the opinion requires an Employer to act as an employment agency for a claimant's lifetime. Edwards is consistent with prior decisions which require an employer to show real, available, sustainable employment to avoid their obligation to pay permanent and total disability benefits. Bumble Bee Seafood v. Director, OWCP, 629 F. 1329

(9th Cir. 1980); Hairston v. Todd Shipyards Corporation, 849 F. 2d 1194 (9th Cir. 1988). Not only must the Employer be able to point to specific jobs which claimant could be expected to fill given all his limitations and abilities, these jobs must actually be available in the community where claimant resides. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1042-1043 (5th Cir. 1981). American Stevedores, Inc. v. Salzano, 538 F. 2d 933, 935-936 (2d Cir. 1976).

Nothing in the Ninth Circuit's opinion in Edwards requires the Employer to act as a lifetime employment agency. See

Todd's brief at p. 17. To the contrary, the only requirement of Todd was to show prior to trial the existence of jobs which Claimant could likely secure and hold if reasonably diligent. The ALJ determined that Todd failed to do so.

The legal principle is settled. The Employer must show available, suitable, sustainable alternative employment. As a factual matter, the ALJ is in the best position to determine whether a specific showing meets the legal standard.

Todd argues that a showing of any job for any duration, presumably even for only a day, would satisfy the employer's

burden of demonstrating suitable alternative employment and sever Todd's responsibility to provide lifetime disability benefits. This is absurd. No reasonable person could justify terminating permanent and total disability benefits because the employer showed a one-day temporary job which claimant obtained. But at what level is a showing sufficient? The ALJ, as the sole factfinder in the process, is in the best position to evaluate the alternative jobs proferred by the employer, the suitability of those jobs to claimant, the claimant's diligence in seeking the jobs and any circumstances which may render the employer's showing illusory.

Contrary to Todd's brief, Edwards does not "require an employer to meet its Bumble Bee standard not just once but repeatedly over Claimant's lifetime." Todd brief pp. 17-18. The employer need make the showing only once but the showing must be sufficient in scope that the claimant could realistically expect to obtain regular and continuous employment.

Todd further exaggerates Edwards as standing for the proposition that "not withstanding (sic) the identification of specific jobs, failure to obtain or hold a job, for whatever reason, will impose upon the employer a permanent and total

award. (Footnote deleted)." Todd brief p. 18.

Edwards says no such thing. Edwards merely stands for the proposition that an Employer must establish, based on substantial evidence, that a claimant could likely secure suitable alternative employment if reasonably diligent. Nothing in Edwards precludes a finding of suitable alternative employment in those situations where the claimant fails to show up for employment, falsifies records or otherwise loses employment due to his own actions. What happened to Edwards was totally different. Edwards lost employment

through no fault of his own and was left unemployed and unemployable because no suitable work existed for him.

II

THE ISSUE IS NOT YET READY FOR SUPREME COURT RESOLUTION

What constitutes a showing of suitable alternative employment remains an issue in flux at the Court of Appeals level. Although no Circuit requires an employer to act as a guarantor of employment during a claimant's lifetime, various courts have expressed the necessary showing in different ways. In the Ninth Circuit, the employer must show specific jobs which the claimant could

likely secure and hold if reasonably diligent. The Second Circuit in Palombo v. Director, OWCP, 937 F. 2d 70 (2nd Cir. 1991) established a three-step process. If claimant is first able to demonstrate his inability to return to his prior occupation, he is entitled to permanent and total disability benefits. The burden then shifts to the employer to prove the existence of suitable alternative employment in the claimant's community. If the employer carries its burden, the claimant may rebut the employer's showing by demonstrating that he diligently but unsuccessfully attempted to secure such employment. This process has been endorsed by the

Fourth Circuit in Newport News Shipbuilding and Dry Dock Company v. Tann, 841 F. 2d 540, 542 (4th Cir. 1988) and the Fifth Circuit in Rogers Terminals v. Director, OWCP, 784 F. 2d 687, 691 (5th Cir. 1986).

However, the Fifth Circuit disagrees with the basic premise of Bumble Bee that specific jobs must be shown. New Orleans(Gulfwide) Stevedores v. Turner, 661 F. 2d 1031 (5th Cir. 1981); Avondale Shipyards v. Guidry and Director, OWCP, 967 2d 1039 (5th Cir. 1992).

Another recent disharmonious case is Brooks v. Director, OWCP, 2 F. 3rd 64

(1993). In Brooks the claimant lost his employment due to his own misconduct. In Edwards, the job was lost because it was no longer available. The Brooks court framed the issue generally, saying that where employment is lost for reasons unassociated with claimant's disability he is not entitled to permanent and total disability benefits. The Court did not distinguish between those situations where a claimant loses ongoing employment because of misconduct and the situation in Edwards where a claimant loses employment because the employment no longer exists.

Because Circuit Courts of Appeal are continuing to define circumstances which

make or defeat a showing of suitable alternative employment, the issue is not yet ready for Supreme Court review. Clearly Edwards is fully consistent with long-standing Ninth Circuit precedent and the precedent in most other Circuits. Conflict with the Fifth Circuit in particular may be resolved as further litigation clarifies the appropriate standard.

CONCLUSION

The Ninth Circuit's decision in Edwards is fully consistent with the remedial purposes of the LHWCA, prior precedent within the Ninth Circuit and the majority of other Circuit opinions on the

issue. To the extent the legal and factual definitions are still evolving, as evidenced by recent decisions in the Second and Fourth Circuits, the issues addressed in Edwards should remain at the Court of Appeals level for further clarification and possible harmony.

For all these reasons, Todd's Petition For Writ of Certiorari should be denied.

Respectfully submitted,
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